No. 87-1245

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXAS MONTHLY, INC.,

Appellant,

—v.—

BOB BULLOCK, *et al.*,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF TEXAS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE TEXAS CIVIL LIBERTIES UNION, THE AMERICAN JEWISH CONGRESS AND THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF APPELLANT

Kerry McGrath
James C. Harrington
Texas Civil Liberties Union Foundation
1611 East First Street
Austin, Texas 78702-4455
(512) 477-5849

Steven R. Shapiro
(*Counsel of Record*)
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members dedicated to defending the principles of individual liberty embodied in the Constitution. The Texas Civil Liberties Union is one of its state affiliates.

A central tenet of the ACLU since its founding nearly 70 years ago is that the government must remain neutral in matters of individual conscience. Thus, the free speech clause of the First Amendment prohibits the government from favoring one publication over another because of its content. Likewise, the establishment clause of the First Amendment prohibits the

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1/ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2.

government from favoring religion over non-religion except in very limited circumstances. By granting religious periodicals a special exemption from the state sales tax, Texas has violated both of these principles.

The American Jewish Congress is a membership organization of American Jews founded in 1918 which seeks to protect the religious, political and economic rights of Jews and to promote civil rights and liberties for all Americans. The American Jewish Congress is particularly committed to the great freedoms secured by the First Amendment which ensure government neutrality with respect to religion and which bar government from subsidizing religious speech because of its content.

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance

good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

Amici submit this brief in support of appellant, and urge this Court to reverse the decision below.

STATEMENT OF THE CASE

This case challenges the constitutionality of a Texas statute that confers a unique and valuable benefit on religion by relieving religious periodicals, and only religious periodicals, of any obligation to pay the state sales tax. Specifically, §151.312 of the Texas Tax Code provides:

> Periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religion or religious faith are exempted from the taxes imposed by this Chapter.

Appellant Texas Monthly is a general interest magazine that is neither "published [n]or distributed by a religious faith." Without the benefit of the tax exemption available to religious periodicals, it paid (under protest) approximately $150,000 in state sales tax for the eleven

month period between January and December 1985. Bullock v. Texas Monthly, Inc., 731 S.W.2d 160, 162 (Tx.Ct.App. 1987). It then brought suit seeking restitution on two separate but related constitutional theories.

First, appellant contended that its tax liability could not be determined by the content of its magazine under well-settled principles of First Amendment law. That claim was rejected by the court below on the purported authority of Regan v. Taxation with Representation, 461 U.S. 540 (1983). On rehearing, the Texas Court of Appeals also rejected the relevance of Arkansas Writers' Project v. Ragland, 107 S.Ct. 1722 (1987). As construed by the court below, Ragland only applies when a small group of magazines is singled out for taxation based on content, and does not

apply when a small group of magazines is singled out for a tax exemption based on content. 731 S.W.2d at 165.

Second, appellant argued that the state's decision to grant preferential tax status to religious periodicals violated the establishment clause. This claim, as well, was rejected below in a discussion that rested almost entirely on this Court's decision in Walz v. Tax Commission, 397 U.S. 664 (1970).

SUMMARY OF ARGUMENT

The central teaching of the First Amendment is that the government must remain neutral in matters of individual conscience. E.g. Wallace v. Jaffree, 472 U.S. 38, 50 (1985). That principle is expressed in a variety of specific First Amendment doctrines, two of which are particularly relevant here. In matters of speech, the government is generally barred from drawing distinctions based on content. In matters of faith, the government is generally barred from favoring religion over those who pursue a more secular vision of society.

Both these doctrines are the product of long and bitter experience; both are deeply embedded in our national heritage; and both were violated by the decision below. Moreover, the decision below seri-

ously misinterpreted several recent decisions by this Court reaffirming the constitutional principle of government neutrality under the First Amendment.

This Court has been especially vigilant in ensuring that the government's power to tax does not become a weapon for censorship. Thus, this Court has repeatedly and consistently struck down taxing schemes that either penalize or reward taxpayers because of the content of their speech. See Arkansas Writers' Project v. Ragland, supra; Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press, 297 U.S. 233 (1936).

Contrary to the view of the court below, Regan v. Taxation with Representation ("TWR") is entirely consistent with this line of cases. In TWR, the Court

carefully emphasized that the special tax benefit granted to veterans' groups was tied to their status and not to the content of their lobbying program. Here, by contrast, the challenged tax exemption turns solely on questions of content.

Furthermore, the content-based judgments compelled by §151.312 have only one purpose: to grant a preference to religious periodicals. That purpose is inconsistent with the most basic premises of the establishment clause. Edwards v. Aguillard, 107 S.Ct. 2753 (1987). In addition, the statute has the effect of promoting religion, and encouraging an excessive entanglement between church and state. Lemon v. Kurtzman, 403 U.S. 602 (1971). Nor can the specter of entanglement be avoided by delegating to religion the right to decide whether the criteria

for tax exemption have in fact been met. See Larkin v. Grendel's Den, 459 U.S. 116 (1982).

Finally, Walz v. Tax Commission cannot be read as a blanket endorsement of any tax scheme benefiting religion. In Walz, the Court upheld a property tax exemption that religious organizations shared with other charitable groups. The Court has never upheld a tax exemption targeted at religion alone. Even if such a targeted benefit is not per se unconstitutional, it cannot be sustained unless necessary to accommodate a substantial free exercise claim. In this case, there is none. Cf. Corporation of Presiding Bishop v. Amos, 107 S.Ct. 2862 (1987).

I. A STATUTORY SCHEME THAT AWARDS TAX BENEFITS TO CERTAIN MAGAZINES BUT NOT TO OTHERS BASED ON CONTENT VIOLATES THE FIRST AMENDMENT

Under Texas law, a magazine that consists "wholly of writings promulgating" the religious faith of its publisher is exempt from the sales tax that other periodicals must pay. On its face, this statutory scheme violates the obligation of content-neutrality imposed by the First Amendment.

As this Court has frequently noted:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Thus, "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amend-

ment." Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984). See also Boos v. Barry, 108 S.Ct. 1157 (1988); Carey v. Brown, 447 U.S. 455 (1980).

This Court has been especially sensitive to charges of selective taxation based on content. The explanation for that concern is obvious. "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." Minneapolis Star, 460 U.S. at 585.

Reflecting that concern, this Court has never upheld a differential tax scheme based on the content of a publication. The issue has come to the Court three times over a period of nearly fifty years, and on each occasion the Court has ruled in favor of the taxpayer on First Amendment grounds. See Arkansas Writers' Project v. Ragland,

supra; Minneapolis Star, supra; Grosjean v. American Press, supra.

The Court's most recent holding, in Ragland, succinctly summarizes the well-settled law in this area:

> [T]he basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content.

107 S.Ct. at 1727 (emphasis in original).

The decision by the Texas Court of Appeals attempts to distinguish Ragland on the ground that the state in that case had chosen to tax a "small group" of publishers whereas here the "great mass of publishers remain subject to the sales tax." 731 S.W.2d at 165. It is not exactly clear why the court below found this distinction meaningful. In any event, it is flawed both descriptively and theoretically.

Like most affirmative/negative distinctions, the line drawn by the court below is mostly a matter of perspective. Instead of focusing on the "great mass of publishers who remain subject to the sales tax" in Texas, the court could just as easily have focused on the "small group" of publishers who are exempt from the tax.

Presumably, the court meant to suggest that the likelihood of a punitive tax decreases as the size of the taxed group increases. However, that assumption is irrelevant even assuming it is valid.2/ As this Court stated in Minneapolis Star, 460 U.S. at 592, and repeated in Ragland, 107 S.Ct. at 1727, "[i]llicit legislative intent is not the sine qua non of a viola-

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2/ In both Grosjean and Minneapolis Star, the state's largest newspapers were in the "small group" of publications subject to a discriminatory tax.

tion of the First Amendment." For similar reason, this Court has not required evidence of viewpoint discrimination in this context. Ragland, 107 S.Ct. at 1728.

The effort by the court below to draw an analogy between this case and Regan v. Taxation with Representation is equally flawed. In TWR, the Court upheld a provision of the federal tax code that permits veterans' organizations to lobby with tax exempt dollars although other charitable groups are denied a similar benefit. Unlike the statute in this case, however, the statute in TWR was content-neutral.

Moreover, the Court emphasized precisely that point, noting that "the veterans' organizations that qualify under [the statute] are entitled to receive tax-deductible contributions regardless of the content of any speech they may use,

including lobbying." 461 U.S. at 548. In short, their favorable tax treatment was a function of who they were, not what they said. Id. at 550-51.3/

The Texas statute, by contrast, is undeniably content-based. Religious publications are not automatically entitled to a tax exemption regardless of what they print. The exemption is only available if the publication consists "wholly" of religious writings. That determination plainly cannot be made without examining the contents of each specific issue and article.

Under the circumstances, Texas "faces a heavy burden in attempting to defend its

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3/ The court below also cited TWR for the proposition that the First Amendment does not guarantee a right to have one's speech subsidized by the government. 731 S.W.2d at 165. That proposition, however, is not in dispute here. Texas Monthly claims only the right to be free from discrimination because of the content of its message.

content-based approach to taxation of magazines." Ragland, 107 S.Ct. at 1728. Having employed the wrong legal analysis, the court below also employed the wrong legal standard. Rather than the strict scrutiny demanded by this Court's decisions in Ragland and Minneapolis Star, the decision of the Texas Court of Appeals is so deferential in its standard of review that it does not even pause to identify -- let alone examine -- the interests asserted by the state in support of the challenged statute.

In reviewing possible justifications for the Texas statute, this Court is not writing on a clean slate. The desire to raise additional revenue for the state is clearly insufficient to justify a scheme of differential taxes based on the content of protected speech. Ragland, 107 S.Ct. at

1728-29; Minneapolis Star, 460 U.S. at 586. And for reasons more fully described in the following section, the desire to favor religion through the distribution of favorable tax benefits is clearly prohibited by the establishment clause. Finally, Texas' benevolent attitude toward religion cannot be described as necessary to preserve free exercise rights since there is no free exercise right to a tax exemption. United States v. Lee, 455 U.S. 252 (1982).

In short, there is no compelling justification adequate to support the challenged statute. Under Ragland and Minneapolis Star, it must be struck down.

II. THE ESTABLISHMENT CLAUSE IS VIOLATED BY A STATE STATUTE THAT SINGLES OUT RELIGION FOR FAVORABLE TAX TREATMENT

Section 151.312 offends the neutrality principle of the First Amendment in a second fundamental sense. By requiring state officials to make content-based judgments in administering the tax laws, it violates the free speech clause of the First Amendment. By singling out religion as the only subject matter entitled to favorable tax treatment, it also violates the establishment clause.

This point was aptly summarized by the dissenting opinion of Justice Carroll in the Texas Court of Appeals:

> Special tax benefits given only to religions cannot be squared with the principle of neutrality, and such laws have the inevitable effect and purpose of aiding and advancing only those benefited religious organizations.

731 S.W.2d at 169 (emphasis in original).

In response to appellant's establishment law challenge, the majority below relied almost entirely on Walz v. Tax Commission, 397 U.S. 664 (1970). Walz, however, is readily distinguishable. The New York statute at issue in Walz did not single out religion for favored treatment. Rather, the question before the Court was whether religious organizations should be disabled from receiving a tax benefit otherwise available to a broad range of charitable groups. 397 U.S. at 672-73.

This distinction is a crucial one and has been emphasized by the Court in numerous decisions. For example, in Mueller v. Allen, 463 U.S. 388 (1983), the Court upheld a Minnesota statute permitting parents to deduct certain educational expenses even if those expenses were incurred for religious education. The deci-

sion turned, in large measure, on the Court's observation that "the deduction is available for educational expenses incurred by all parents . . . ." Id. at 397 (emphasis in original). See also Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986).

By contrast, in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), the Court struck down a system of tuition grants that were only available to parents of children in non-public schools.4/ See also Sloan v. Lemon, 413 U.S. 825, 832 (1973).

4/ Nyquist specifically distinguished this Court's earlier decisions in Everson v. Board of Education, 330 U.S. 1 (1947), and Board of Education v. Allen, 392 U.S. 236 (1968), on the ground that "the class of beneficiaries [in both those cases] included all schoolchildren, those in public as well as those in private schools." 413 U.S. at 782 n.38 (emphasis in original).

Amici do not contend that a statutory exemption limited to religion is per se invalid under the establishment clause. See Corporation of Presiding Bishop v. Amos, 107 S.Ct. 2862, 2869 (1987). At the same time, "[t]he Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause . . . ." Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972). Accordingly, such exceptions have been permitted only if "vital . . . to the protection of values promoted by the right of free exercise." Id. at 221.

For example, the concern in Amos was that a broad application of Title VII to religious groups might burden their core associational rights. 107 S.Ct. at 2869. Here, there is no similar countervailing

interest. As previously noted, there is no free exercise right to a tax exemption. United States v. Lee, supra. Conversely, the denial of a tax subsidy that no one else is receiving has never been recognized as an unconstitutional burden on First Amendment freedoms. See Ragland, 107 S.Ct. at 1731 (Scalia, J., dissenting).

Viewed as a special subsidy for religion, the Texas statute cannot survive the familiar tripartite test of Lemon v. Kurtzman, 403 U.S. 602 (1971). Indeed, it fails each element of the test. There is no conceivable secular purpose in a law designed to encourage the promulgation of a religious message. Unlike Amos, this is not a case in which the state is acting "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their

religious missions." 107 S.Ct. at 2868. Rather, this is a case in which the state is actively assisting religion in spreading its faith through subsidized publications.

In Edwards v. Aguillard, 107 S.Ct. 2573 (1987), this Court struck down the Louisiana Creationism Act because its requirement that evolution and creationism be given equal time in the classroom lacked a valid secular purpose. Here, Texas has gone beyond a requirement of mandated equality; it has given religion a preferential place in the marketplace of ideas through its differential tax scheme. If anything, the favored treatment of religion under the Texas statute conveys even a clearer message of endorsement than in Aguillard, and thus is more clearly barred by the establishment clause. See Grand

Rapids School District v. Ball, 473 U.S. 373, 389 (1985).

The Texas statute also has the undeniable effect of advancing religion by relieving religious magazines of the substantial tax burden imposed on other periodicals delivering a non-religious message.[5] At a very minimum, the establishment clause surely prohibits the government from granting a competitive advantage to religion in the marketplace of ideas.

Finally, the Texas law dangerously entangles church and state.[6] By its very

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[5] As previously noted, Texas Monthly paid nearly $150,000 in state sales tax for the eleven month period between January and December 1985. See pp.3-4, infra.

[6] The state's contention that its differential tax scheme is necessary to avoid entanglement between church and state is difficult to comprehend. Without the exemption, the state would simply treat religious publishers like all other publishers subject to the tax. Moreover, the tax in this case is easily calculated; it does not

(continued...)

terms, the tax exemption only applies to "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith . . . ." Even assuming that the bona fides of a religion can be determined without excessive entanglement, see United States v. Ballard, 322 U.S. 78 (1944), the inquiry into whether specific writings "promulgat[e] . . . the faith" is laden with establishment clause problems.

Echoing Madison's famous Memorial and Remonstrance Against Religious Assess-

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6/ (...continued)
require intrusive apportionment. Preventing such limited interaction between the state and religious publishers hardly demonstrates the compelling state interest necessary to sustain a content-based classification. See Widmar v. Vincent, 454 U.S. 263, 276 (1981).

ments,[7] this Court has frequently noted the danger of permitting state officials to scrutinize religious speech and determine its religious content, albeit in contexts in which the religious speech is typically the subject of censorship rather than favored treatment.

For example, in Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court rejected the right of public officials to determine what is or is not a "religious

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[7] Madison objected to a proposed public tax in support of religious education on a variety of grounds, including his concern that

> the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

See Everson v. Board of Education, 330 U.S. at 67.

cause." As the Court correctly observed, such judgments inevitably involve the "appraisal of facts, the exercise of judgment, and the formation of an opinion." Id. at 305. For both practical and historical reasons, the Court found such a grant of discretionary authority incompatible with the notion of religious liberty protected by the First Amendment.

Similarly, in Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981), this Court rejected a proposed distinction between religious worship and religious speech on the ground that it would compel the state

> "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances to the same religious faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases."

Accord, Lemon v. Kurtzman, 403 U.S. at 620 ("state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids"); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953)("it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment").[8/]

In an effort to avoid these entanglement problems, Texas officials testified at trial that "we leave it to [the organization] to decide whether or not it's a publication that teaches their faith." 731

8/ The dissenting opinion below made a similar point: "It is important for the continued ability of all people to worship as they choose that no state official be allowed to determine what is and what is not a religion." 731 S.W.2d at 166.

S.W.2d at 164. This hands-off approach, however, only creates different establishment clause problems.

Needless to say, Texas does not ordinarily allow taxpayers to determine their own eligibility for a tax exemption. By ceding that authority to religion in this instance, Texas has created a statutory framework that "enmeshes churches in the processes of government." Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982). The benefit obtained by religion is therefore real and "symbolic." Id. at 125. Both on its face and as applied, the Texas statute cannot be reconciled with the establishment clause.

CONCLUSION

The First Amendment mandates government neutrality toward thought and belief. Texas has violated that mandate by enacting a special tax exemption for religious periodicals. For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

Kerry McGrath
James C. Harrington
Texas Civil Liberties
Union Foundation
1611 East First Street
Austin, TX 78702-4455
(512) 477-5849

Steven R. Shapiro
(Counsel of Record)
John A. Powell
American Civil Liberties
Union Foundation
132 West 43 Street
New York, NY 10036
(212) 944-9800

Dated: June 2, 1988